STATE OF MICHIGAN

IN THE SUPREME COURT

TRI-COUNTY INTERNATIONAL TRUCKS, INC. a Michigan Corporation, and IDEALEASE OF FLINT, a Michigan Corporation,

Plaintiffs-Appellees,

vs.

HILLS' PET NUTRITION, INC., a Michigan Corporation,

Defendant-Appellant.

Docket No. 130671

Court of Appeals No. 255695

Lenawee County Circuit Court No. 02-986-CK

130671

DEFENDANT HILLS' PET NUTRITION'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE, PER 7/21/06 ORDER GRANTING ORAL ARGUMENT

*** * * ORAL ARGUMENT REQUESTED* * ***

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STATEMENT OF JURISDICTION AND ORDER APPEALED FROM

Defendant Hills' Pet Nutrition incorporates the statement from its Application for Leave to Appeal.

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STATEMENT OF QUESTIONS PRESENTED

Defendant Hills' Pet Nutrition incorporates the statement from its Application for Leave to Appeal.

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SUPPLEMENTAL STATEMENT OF FACTS

Defendant Hills' Pet Nutrition incorporates the statement from its Application for Leave to Appeal, adding only that, on July 21, 2006, this Court issued an order directing the Clerk to schedule oral argument under MCR 7.302(G). That order also directed that the parties could file supplemental, non-redundant briefs within 42 days. This brief is submitted timely under that order. It examines the issue that the order directed the parties to address at oral argument: "Whether defendant was under a duty to indemnify Tri-County."

STATEMENT OF STANDARD OF REVIEW

Defendant Hills' Pet Nutrition incorporates the statement from its Application for Leave to Appeal.

ARGUMENT

Under Schedule B of the parties' contract, Hills' Pet expressly did not agree to indemnify Tri-County (or Idealease of Flint) for their own negligence. Brian Head sued Tri-County only for negligence. Tri-County also has no right of indemnity under the National Agreement between Hills' Pet and Idealease because Tri-County has not been able to show that it is the "Authorized Member" as to the vehicle it negligently provided for Brian Head's use.

a. A brief reprise

The Court of Appeals ordered Hills' Pet to pay Tri-County back for its settlement with Brian Head. That is the result of its reversal of the trial court's order granting Hills' Pet's motion for summary disposition. Brian Head was the Hills' Pet employee who was grievously injured because Tri-County removed a warning tag from a vehicle that needed steering column repair.

To remind: this is the indemnity agreement that the Court of Appeals enforced against Hills' Pet and in favor of Tri-County (and Idealease of Flint):

> 10. INDEMNIFICATION.
>
> Customer agrees to indemnify and hold: ***Lessor, Owner, IDEALEASE, INC., and all Authorized Members*** harmless from and against:
>
> A. Any claim or cause of action for death or injury to persons or loss or damage to property, arising out of or caused by the ownership, maintenance, use or operation of any Vehicle covered by this Agreement.
>
> B. All liability for the death of or injury to Customer, its employees, drivers, passengers or agents arising out of the ownership, maintenance, use or operation of any Vehicle covered by this Agreement.[1] [Emphasis added.]

Paragraph 10 of the National Agreement was amended (contemporaneously with its signing) by Schedule B to *exclude* indemnity whenever (as here) the liability is on account of the wannabe indemnitees' "direct responsibility or negligence." Schedule B provides for indemnity:

> *Unless* such action is proved to be the ***direct responsibility or negligence*** of Lessor..." [Emphasis added, ellipsis in original.][2]

Recall, also, that Hills' Pet argues that the phrase "Lessor . . . (ellipsis)" actually refers to "Lessor, Owner, IDEALEASE, INC., and all Authorized Members," which is the grouping of four status/parties used repeatedly throughout the National Agreement indemnity term and repeatedly within Schedule B.

The Court of Appeals ruled that Schedule B's softening of the indemnity term to exclude indemnity when any one of the four categories (including "all Authorized Members") were negligent only applied to the one party identified as the "Lessor" in the National

[1] *Exhibit E* to Hills' Pet's Application, National Agreement, p 4.
[2] *Exhibit E-1* to Hills' Pet's Application, Schedule B Addendum, ¶ 10.

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Agreement. Since Brian Head never sued that party, the Court of Appeals decided Schedule B did not matter one bit. This was the ruling even though plaintiffs' *own* witness testified, consistent with Hills' Pet's interpretation of the function of the ellipsis, that the parties intended that Hills' Pet was not supposed to pay indemnity when Idealease entities were sued for their own negligence. Listen to Idealease's chief negotiator, Dan Murphy:

> *Q.* Why was that [¶10 of Addendum] put in?
>
> *A.* I would speculate that to soften the standard indemnification language.[3]
>
> * * *
>
> *Q.* And *what was the reason* you under, understood *it was being negotiated for*?
>
> *A.* *To **soften** the standard indemnification language that's in **our contract**.*[4]

"Our" [plaintiffs'] contract. Just so. Though the National Agreement was heavily negotiated, especially as is made clear by the Schedule B addendum that the Court of Appeals ignored, the core contract and its indemnity form was drafted by Idealease.

b. The Court of Appeals ignored the disfavored status of indemnity agreements and impermissibly strained to create an indemnity obligation that the parties did not agree to.

The parties know, better than the Court of Appeals, who is (and isn't) "an" or "any" "Authorized Member." The testimony of Tri-County and Idealease's *own* principals and negotiators made it clear that Tri-County was not a Member and *particularly* that it was not an "Authorized Member" because, as the contracts establish, that status was created, vehicle-by-vehicle, Schedule A-by-Schedule A. In deference to the Court's July 21, 2006 order to avoid redundancy in this supplemental brief, Hills' Pet will not recount the testimony, Tri-County's

[3] *Exhibit G* to Hills' Pet's Application, Murphy Deposition, p 14.
[4] *Id.*, p 16.

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argument on the record and in its briefs, and the plaintiffs' answers to requests to admit. The record shows that Tri-County was *not* an "Authorized Member" and was not identified as an "Authorized Member" on any Schedule for the truck Head was driving when he was injured. Indeed, the 1994 Schedule that the Court of Appeals hung its hat on to create Authorized Member status for Tri-County, makes it clear that the parties did not intend for Tri-County to be considered such a member as to the vehicle Head was driving when he was injured. That irrelevant 1994 Schedule identified Tri-County as an "Authorized Member *for Vehicles Shown on...*" that Schedule. It did not grant such status for Vehicles *not* shown on the Schedule.

The record debunks Tri-County's claim to "Authorized Member" status, even if this Court were to agree with the Court of Appeals that the Schedule B "softening" of the indemnity term is not applicable.

Additional aids to indemnity contract interpretation

As in any contract, the parties' intention must be gleaned from the contract as a whole, not from review of detached or isolated parts of it. The words of the entire contract are to be considered, reconciling and giving meaning to all of its parts, whenever that is possible. *Arrow Sheet Metal Works v Bryant & Detweiler Co*, 338 Mich 68, 76; 61 NW2d 125 (1953). "An indemnity clause should be interpreted to give a reasonable meaning to all of its provisions." *MSI Construction Managers v Corvo*, 208 Mich App 340, 343; 527 NW2d 79 (1995). Contractual indemnity depends on the terms to which the parties have agreed. *Grand Trunk Western R Inc. v Auto Warehouse*, 262 Mich App 345, 351; 686 NW2d 756 (2004).

Liability for another party's tort obligations can shift contractually, but only where the language is "clear" and "unequivocal" in requiring it. *Reed v St Clair Rubber*, 118 Mich App 1, 8; 324 NW2d 512 (1982); *Palomba v City of East Detroit*, 112 Mich App 209, 215; 315 NW2d 898 (1992). Indemnity contracts are to be "strictly construed to prevent a casual

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interpretation that would allow indemnification for the consequences of a party's own negligence." *McLouth Steel v Anderson Corp*, 48 Mich App 424, 430; 210 NW2d 448 (1973).

"[I]ndemnity contracts are construed strictly against the party who drafts them and against the indemnitee." *Sherman v DeMaria Bldg*, 203 Mich App 593, 596; 513 NW2d 187 (1994). In accord, for example, *MSI Construction*, *supra* at 344. Respect for this principle of *contra proferentem* is especially required in the indemnity context, because such contracts have the potential to shift vast liabilities away from parties who are at fault to parties who are innocent of any fault. It is true that the National Agreement was a negotiated one. But it is still significant that the core National Agreement is an *Idealease*-drafted indemnity contract, not one drafted by Hills' Pet. Among the principles of indemnity contract interpretation violated by the Court of Appeals' majority was the principle that ambiguities in these types of contracts are supposed to be interpreted against the party who is being indemnified *especially when that party also drafted the hold harmless language.*

If this Court finds there is *any* ambiguity in the indemnity language as it relates to Hills' Pet (or Idealease of Flint's) claimed entitlement, the trial court result must be reinstated.

c. Additional contractual indemnity case developments since Hills' Pet's Application was filed

Since the filing of Hills' Pet's Application for Leave to Appeal in early March of 2006, the Court of Appeals has been called on to write opinions in a series of summary disposition express contractual indemnity cases. The new cases include: *Alfresh Beverages v Garden Food*, unpublished opinion per curiam of the Court of Appeals issued March 21, 2006 (Docket No. 264901), *Velez v Dollar Tree Stores*, unpublished opinion per curiam of the Court of Appeals issued March 30, 2006 (Docket No. 263820), *Lynn v Detroit Edison*, unpublished opinion per curiam of the Court of Appeals issued May 23, 2006 (Docket No. 258942, 258943), *Young v Delcor Associates*, unpublished opinion per curiam of the Court of Appeals

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issued June 27, 2006 (Docket No. 266491). In a steady stream, these cases continue to occupy the time of the Court of Appeals. By contrast, this Court has not seen fit to issue an opinion on express contractual indemnity since 1975. See *Vanden Bosch v Consumers Power*, 394 Mich 428; 230 NW2d 271 (1975).

There are disparate approaches and disparate results, even as to almost identical issues and circumstances in recent (and not-so-recent-cases). Consider, and compare, for example *Lanzo Construction v Wayne Steel Erectors*, unpublished opinion per curiam of the Court of Appeals issued January 26, 2006 (Docket No. 258233) and *Papalas v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals issued November 8, 2005 (Docket Nos.252470, 252527), where "sole negligence" exceptions within indemnity contracts were applied in exactly contradictory ways, in two cases that included two of the same panel members.[5] This situation is highly suggestive of the need for this Court to issue a clarifying contractual indemnity opinion that will bring order to the disorder.

Lynn, ***Exhibit A***, is of some interest given that the majority in the present case was improperly impressed by the idea that the word "any" in an indemnity contract—apparently wherever that word is found—signifies some broad grant of indemnity.

In *Lynn*, Lynn's employer (CCG) agreed to indemnify Comcast in a very broadly worded contract that included a promise to hold Comcast harmless "from and against...all claims, liability...arising from or in connection with...the work." Lynn was injured performing CCG's work for Comcast, while installing cable in the vicinity of Edison's power line. He sued Edison and Comcast. Eventually (as here) the personal injury portion of the case settled and Edison, Comcast and CCG continued on to litigate their hold harmless obligations.

Edison sued Comcast seeking indemnity under a written contract. Comcast sued CCG also seeking indemnity under a written contract. The trial court, impressed with the broad hold

[5] Both *Lanzo* and *Papalas* are pending in this Court on Applications for Leave to Appeal.

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harmless agreement CCG signed, granted summary disposition in Comcast's favor. It permitted Comcast to shift its portion of the Lynn liability to CCG. The trial court also permitted Comcast to shift its *own* contractual indemnity liability owed to Edison to CCG. *That* the Court of Appeals would not permit:

> The language of the indemnity agreement between Comcast and CCG is broad, but nevertheless is unambiguously limited to the nature of the subcontract work being performed by CCG, and does not encompass Comcast's indemnity liability assumed under a contract with a third party. The trial court erred in passing through to CCG, Comcast's liability for Edison's settlement with Lynn. * 22

In other words, even broad terms in indemnity agreements ("all" "any" "arising from" "in connection with") are not supposed to be uncritically applied to scoop up liability the parties' contract does not unambiguously intend to include. The Court of Appeals' majority in this case clearly erred in resolving the indemnity dispute against Hills' Pet and in favor of Tri-County. At a minimum, this Court should correct that error.

RELIEF REQUESTED

Defendant Hills' Pet Nutrition incorporates the statement from its Application for Leave to Appeal.

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Dated: August 31, 2006
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